(2)

No. 00-402

Supreme Court, U.S.
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In The

Supreme Court of the United States

SHIRLEY A. DVORAK,

Petitioner,

v.

THE DISCIPLINARY BOARD OF THE NORTH DAKOTA SUPREME COURT,

Respondent.

On Petition For A Writ Of Certiorari To The North Dakota Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the North Dakota Supreme Court violates procedural due process under the Fourteenth Amendment by suspending an attorney from the practice of law under its inherent power in order to circumvent its own mandatory rules governing lawyer disciplinary process.

2. Whether the North Dakota Supreme Court violates procedural due process und the Fourteenth Amendment by suspending an attorney from the practice of law on the basis of a knowing violation of a rule of law where the rule of law is first announced in the same decision suspending the attorney.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding constitute the litigants to the decision of the North Dakota Supreme Court. Each party appears below and includes the designation of either "Petitioner" or "Respondent".

Petitioner

Shirley A. Dvorak

Respondent

The Disciplinary Board of the North Dakota Supreme Court

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the disciplinary board of the North Dakota Supreme Court, respectfully requests that the Court deny the Petition for a Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the North Dakota Supreme Court.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari for the following reasons. First, the Petitioner raises here for the first time a federal constitutional issue not raised in the state court below. Second, a significant federal question does not exist under the facts of the instant case. Third, Petitioner was not suspended from the practice of law based on a violation of a rule of law first announced in the same decision by which she was suspended. Fourth, there is no conflict between the North Dakota Supreme Court decision and any decision of the Fifth Circuit Court of Appeals or any other circuit.

A. Petitioner Raises Here For The First Time A Federal Constitutional Issue Not Raised In The State Court Below

Petitioner has asserted that she was denied due process under the Fourteenth Amendment because the North Dakota Supreme Court invoked its inherent power, referred to in Rule 3.1H of the North Dakota Rules for Lawyer Discipline, to discipline her following dismissal

of the Petition for Discipline by the North Dakota Supreme Court's disciplinary board.

This Court has noted that it is very well established that the Court will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398, 400 (1969). That is precisely what Petitioner is seeking to do here.

She claims that she raised the due process issue when Disciplinary Counsel sought review by the North Dakota Supreme Court. In fact, the record reflects Petitioner's full understanding, at the time the matter of her misconduct was presented to the North Dakota Supreme Court, that the court had the power to review the dismissal of disciplinary proceedings through the exercise of its inherent authority. The record also reflects that rather than raising a due process question about the North Dakota Supreme Court's exercise of its inherent authority, she simply sought to distinguish her case as one in which that authority need not be exercised.

On January 21, 2000, Petitioner filed with the North Dakota Supreme Court her "Brief of Respondent Shirley A. Dvorak to the North Dakota Supreme Court Opposing the Objections of Appellant to the Disciplinary Board's Order for Dismissal." Her first argument in that brief was entitled, "The Disciplinary Counsel Has No Basis To File Objections, As No Report Was Issued By The Disciplinary Board." *See* Respondent's Appendix at A (hereinafter App. A). In the Course of her argument, Petitioner noted that Disciplinary Counsel had filed objections without a report in *Disciplinary Action Against Anseth*, 1997 ND 66,

562 N.W.2d 385 (N.D. 1997). Petitioner specifically argued that "[t]he Supreme Court did not reach the issue of whether Disciplinary Counsel properly invoked the jurisdiction of the Supreme Court to review the order of dismissal in that case, as the Supreme Court chose to use its inherent disciplinary power there. Id. [*Anseth*], 1997 ND 66 ¶¶16-17, 562 N.W.2d at 388. The Supreme Court found that case 'serious enough for use of that inherent power' under North Dakota Rules for Lawyer Discipline 3.1 (H), ..." *See* App. A at 2a.

Petitioner went on in her brief to the North Dakota Supreme Court to argue that "[t]he Court's use of its inherent and incidental power in that case [*Anseth*] was justified. . . ." She concluded her argument by asserting that the invocation of the North Dakota Supreme Court's inherent authority was not warranted in her case. *See* App. A at 2a.

Petitioner would have this Court believe that she had raised some due process question when review of the disciplinary board's dismissal by the North Dakota Supreme Court was sought by Disciplinary Counsel. The recitation from her brief to the North Dakota Supreme Court reveals not only that she did not raise a due process question, but that she fully acknowledged and understood the inherent authority of the North Dakota Supreme Court to review dismissals of disciplinary proceedings by the disciplinary board.

Although Petitioner wrongly claims in her Petition that she had raised the due process issue in her "appellate brief," she goes on to claim she expressly raised a

due process issue in her petition for rehearing to the North Dakota Supreme Court.

Rule 40 of the North Dakota Rules of Appellate Procedure provides:

> The petition [for rehearing] shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.

See App. B. Petitioner asserts she raised a due process issue in her petition for rehearing by including a statement that it appeared violative of due process to allow the North Dakota Supreme Court to invoke its authority where the disciplinary board proceedings ended without any avenues by which to appeal.

"At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1994, 68 L.Ed.2d 392, 398 (1981); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62, 72 (1988). The "claim" in the petition for rehearing, rather than telling the North Dakota Supreme Court of a point of law or fact which it overlooked, was a vague allusion to a constitutional provision which was not something overlooked or misapprehended by the North Dakota Supreme Court. In fact, as mentioned above, the statement was an allusion to the proposition which had been acknowledged by Petitioner in her

original brief to the North Dakota Supreme Court, i.e., the North Dakota Supreme Court had the inherent authority to review dismissals of disciplinary proceedings by the disciplinary board.

With very rare exceptions, this Court has adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision the Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203, 208 (1997). Petitioner has not met her burden of showing that the due process issue was properly raised to the North Dakota Supreme Court. Rather, the record reflects that the due process issue she now raises in this Court was not only not raised, but that the process was acknowledged by her as entirely proper. At the state court level, Petitioner merely argued that her misconduct was not serious enough to call for the exercise of the North Dakota Supreme Court's inherent power.

B. A Significant Federal Question Does Not Exist Under The Facts Of The Instant Case

Petitioner asserts that the important federal question presented in her case, under the Due Process Clause of the Fourteenth Amendment, arises from the fact that she was not given notice that the North Dakota Supreme Court would invoke its inherent authority, referred to in Rule 3.1(h), North Dakota Rules for Lawyer Discipline, to review the dismissal of her case by the disciplinary board. An attorney subjected to disbarment proceedings

is "entitled to procedural due process, which includes fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117, 122 (1968).

No significant federal question is involved in this case, as Petitioner was afforded complete notice of the charges which were to be considered by the North Dakota Supreme Court. The allegations of misconduct against Petitioner were set out in the Petition for Discipline, which alleged that Petitioner violated Rules 3.4(a) and 4.4, North Dakota Rules of Professional Conduct. *See* App. C. The facts alleged in the Petition for Discipline and the Rules of Professional Conduct alleged to have been violated are the same facts and rules relied upon by the North Dakota Supreme Court when it found that Petitioner had violated the North Dakota Rules of Professional Conduct. *See* Petitioner's Appendix A at 4a-8a (hereinafter Pet. App.) Therefore, the record clearly shows that Petitioner was aware of the charges against her.

The North Dakota Supreme Court's review of the disciplinary board's dismissal of the charges did not deny Petitioner of notice of the charges against her nor did it deprive her of an opportunity to present her defense to the charges. As mentioned above, Petitioner was not only aware that the North Dakota Supreme Court, through its inherent authority, had the power to review matters dismissed by the disciplinary board, she acknowledged, in her brief to the North Dakota Supreme Court, that the court's exercise of that authority had been "justified" in the prior case of *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997). The record shows that Petitioner had notice of the charges, and she had

notice that the North Dakota Supreme Court could invoke its inherent authority to review the dismissal by the disciplinary board.

C. Petitioner Was Not Suspended From The Practice Of Law Based On A Violation Of A Rule Of Law First Announced In The Same Decision By Which She Was Suspended

Petitioner was suspended from the practice of law for violations of two rules of the North Dakota Rules of Professional Conduct. Rule 3.4(a), North Dakota Rules of Professional Conduct, which provides:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[.]

and Rule 4.4, North Dakota Rules of Professional Conduct, which provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.

See App. D.

Petitioner asserts that the North Dakota Supreme Court had never previously held that answers given to a guardian ad litem's questionnaire were statements made in a judicial proceeding and, as such, entitled to absolute privilege from a defamation suit. She is, therefore, arguing to this Court that the North Dakota Supreme Court's

determination that she violated Rule 3.4(a), North Dakota Rules for Lawyer Discipline, violated due process, on the ground that she could not have known that answers given to a guardian ad litem's questionnaire were privileged.

Petitioner is arguing that the North Dakota Supreme Court cannot discipline a lawyer for violating a rule of professional conduct unless the court has previously issued a decision on the rule. However, there was no new rule announced by the North Dakota Supreme Court in its opinion suspending Petitioner. The fact is that the law is clear in North Dakota that there can be no liability for defamatory statements that are privileged. It is equally clear that a communication is privileged when it is given in a judicial proceeding. *See* the opinion of the North Dakota Supreme Court at Pet. App. 5a-6a. The North Dakota Supreme Court held that Petitioner either knew or should have known that her threat of a defamation action against a potential witness was simply a threat that could not have been successfully carried out. The court found that Petitioner attempted to intimidate a potential witness in violation of Rule 3.4(a), North Dakota Rules of Professional Conduct.

D. There Is No Conflict Between The North Dakota Supreme Court Decision And Any Decision Of The Fifth Circuit Court Of Appeals Or Any Other Circuit

In her Petition, Petitioner asserts that there is a conflict between the North Dakota Supreme Court's decision in her case and the holding of the Fifth Circuit in *In re*

Thalheim, 853 F.2d 383 (5th Cir. 1988). It first must be pointed out that there is no conflict between the two cases as *Thalheim* dealt with the procedure and authority of a Federal District Court in the disciplining of a member of its bar, whereas Petitioner was disciplined by the highest court of North Dakota.

In *Thalheim*, the Fifth Circuit determined that the district court had not followed its own rules in initiating a disciplinary action against the lawyer as there was no reservation under those rules for initiating a disciplinary action in the absence of a recommendation by an attorney panel. The state court procedural rules that applied in Petitioner's case specifically provide, in Rule 3.1H, North Dakota Rules for Lawyer Discipline, that nothing in the rules prevents the court from instituting disability or disciplinary proceedings on its own initiative. *See* Pet. App. at 46a. The exercise of that authority by the North Dakota Supreme Court was not only recognized by Petitioner in her original brief to the North Dakota Supreme Court, as discussed above, but was also characterized by Petitioner in that brief as being justified in the prior disciplinary case of *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997).

Petitioner's argument of additional supposed conflicts between the North Dakota Supreme Court in her case and other Federal Circuit cases, likewise is meritless. She makes generalized assertions that the North Dakota Supreme Court's exercise of its inherent authority is contrary to principles of due process, however none of the cases cited by her do conflict with her own case.

She makes multiple references to *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91 (2nd Cir. 1997), *cert. denied*, 522 U.S. 932, 118 S.Ct. 337, 139 L.Ed.2d 262 (1997). In that case the federal district court had notified the lawyer that he had failed to comply with Rule 11, Federal Rules of Civil Procedure, but the court sanctioned the lawyer under 28 U.S.C. § 1927. The appellate court vacated the sanctions, as it found that due process required "specific" notice of the sanctioning authority being considered and the conduct alleged to be sanctionable. The crux of the due process problem that arose in *Ted Lapidus* was that there was a difference in what must be shown to find a violation of Rule 11 and what must be shown to find a violation of 28 U.S.C. § 1927. The lawyer was not, therefore, given notice of what he needed to defend himself against.

In the argument contained in her brief on the issue of an alleged conflict in principle with several of the Federal Circuits, at page 23, Petitioner asserts that the first time that she had notice that the North Dakota Supreme Court would be invoking its inherent power was after the court issued its opinion. However, as previously noted, she acknowledged that possibility in her brief to the North Dakota Supreme Court and merely argued against the court invoking that power in her particular case. Nevertheless, as discussed above, Petitioner had notice from the beginning of the disciplinary process of the sanctioning authority being considered and the conduct alleged to be sanctionable. As was previously noted, the violations of the North Dakota Rules of Professional Conduct found by the North Dakota Supreme Court were the same as those alleged in the Petition for Discipline, and the misconduct that supported those violations was also alleged

in the Petition for Discipline. Petitioner had ample notice of the allegations against her and ample opportunity to defend against them. She understood and acknowledged the procedure which provided for the review of the dismissal of the disciplinary board by the North Dakota Supreme Court. There is no conflict between the North Dakota Supreme Court's action and any Federal Circuit case.

CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Dated: October 10, 2000.

Respectfully submitted,

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APPENDIX A

Legal Argument I. From The Brief Of Respondent Shirley A. Dvorak To The North Dakota Supreme Court Opposing The Objections Of Appellant To The Disciplinary Board's Order For Dismissal

* * *

LEGAL ARGUMENT

I. The Disciplinary Counsel Has No Basis To File Objections, As No Report Was Issued By The Disciplinary Board.

The North Dakota Rules for Lawyer Discipline provide specific guidelines which must be adhered to invoke this Court's review of a Disciplinary Board decision. As Disciplinary Counsel's "Objections to Order for Dismissal" is not allowed under these rules. Disciplinary Counsel is precluded from pursuing this Court's review. The rules provide:

> *Review by the Court.* The board shall promptly submit to the court a report containing its findings and recommendations on each matter heard other than those resulting in remand, dismissal without appeal, consent probation without appeal, or reprimand without appeal. . . . A copy of the report submitted to the court must be served upon counsel, complainant, and the lawyer. Within 20 days of service of the report, the lawyer and counsel may file objections to the report.

N.D.R. Lawyer Discip. 3.1(G). Here, the Disciplinary Board merely issued the Order for Dismissal without drafting or filing any report with the North Dakota Supreme Court. Disciplinary Counsel has no report to file

objections from, so this Court need not review the Order for Dismissal under N.D.R. Lawyer Discip. 3.1(G).

The Disciplinary Counsel similarly filed objections without a report in *Disciplinary Action Against Anseth*, 1997 ND 66, 562 N.W.2d 385 (N.D. 1997). The Supreme Court did not reach the issue of whether Disciplinary Counsel properly invoked the jurisdiction of the Supreme Court to review the order for dismissal in that case, as the Supreme Court chose to use its inherent disciplinary power there. *Id.*, 1997 ND 66 ¶ 16-17, 562 N.W.2d at 388. The Supreme Court found that case "serious enough for use of that inherent power" under North Dakota Rule of Lawyer Discipline 3.1(H), where Anseth violated his duties to his client by failing to surrender his client's original documents after he was discharged, failing to timely complete work undertaken prior to his discharge, and failing to inform his client of the status of the work. *Id.* The Court's use of its inherent and incidental power in that case was justified, where Attorney Anseth maliciously refused to cooperate with his former client and substantially prejudiced the client's rights. This Court found a clear violation of the Rules of Professional Conduct, which require an attorney to surrender papers and property to which a client is entitled when representation is terminated. However, there is no suggestion of such a clear cut violation of the Rules of Professional Conduct to warrant this Court's invocation of North Dakota Rule of Lawyer Discipline 3.1(H) to review this case.

* * *

APPENDIX B

Rule 40. Petition For Rehearing, North Dakota Rules Of Appellate Procedure

RULE 40. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) Form of Petition; Length. The petition shall be in a form prescribed by Rule 32, and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, a petition for rehearing must not exceed 10 pages.

APPENDIX C

Petition For Discipline, In The Matter Of The Application For Disciplinary Action Against Shirley A. Dvorak, A Member Of The Bar Of The State Of North Dakota

BEFORE THE DISCIPLINARY BOARD OF THE

SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION FOR DISCIPLINARY ACTION AGAINST SHIRLEY A DVORAK, A MEMBER OF THE BAR OF THE STATE OF NORTH DAKOTA	)))))))	PETITION FOR DISCIPLINE File No. 3034-E-9804

It is alleged as follows:

I.

Shirley A. Dvorak was admitted to practice law as an attorney and counselor at law in the courts of North Dakota on September 22, 1976, and her name has appeared since that date on the roll of attorneys admitted to the Bar of North Dakota as maintained by the Supreme Court of North Dakota.

II.

Dvorak represented Weston L. Berg in a divorce action during 1997 and 1998 against Brenda M. Berg.

III.

During the course of the divorce action, the Guardian Ad Litem for the children of the parties submitted a written questionnaire to a cousin of Brenda, Debra K. Jacobs, which Ms. Jacobs answered. Dvorak obtained a copy of the statement.

IV.

On February 23, 1998, Dvorak wrote a letter to Ms. Jacobs with the re line of Request For Correction Pursuant To NDCC 32-43-01 Through 10. In the letter, Dvorak asserted that the answers Ms. Jacobs had provided to the guardian ad litem contained false and malicious statements that defamed her client. Dvorak attached to her letter a copy of the questionnaire, with answers. Approximately 34 lines of the attachment, which was nine pages long, were entirely or partially blackened out. Dvorak's letter told Ms. Jacobs to ignore the portions of the statement that were blackened out, as Mr. Berg acknowledged these statements were true. Dvorak concluded her letter by claiming that she was requesting Ms. Jacobs, pursuant to NDCC Chapter 32-43, to correct "your false statements". She then stated "If you fail to do so, Mr. Weston Berg will pursue all remedies available to him."

V.

On March 12, 1998, Dvorak wrote a letter to Ms. Jacobs employer, in which she told that Ms. Jacobs had informed her that the questionnaire and answers were

prepared on her office computer and that the information was stored on the computer's hard drive. Dvorak also wrote "Ms. Jacobs also admitted in her deposition testimony that the information contained in the documents that were written by her and typed on her computer at work, to be untrue. These untrue documents remain stored on her computer hard drive."

VII.

This conduct of Shirley A. Dvorak violates the following Rules of Professional Conduct:

1. RULE 3.4(a), RPC, FAIRNESS TO OPPOSING PARTY AND COUNSEL, which provides A lawyer shall not unlawfully obstruct another party's access to evidence, in that Dvorak attempted to intimidate a potential witness for the purpose of dissuading her from giving evidence, to-wit Debra K. Jacobs, by improperly threatening her ith a defamation action and falsely informing her employer that she had admitted that the information she had typed on her computer at work was untrue;

and

2. RULE 4.4, RPC, RESPECT FOR RIGHTS OF THIRD PERSONS, which provides that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person, in that Dvorak attempted to intimidate a potential witness for the purpose of dissuading her from giving evidence, to-wit Debra K. Jacobs, by improperly threatening her with a defamation action and falsely

informing her employer that she had admitted that the information she had typed on her computer at work was untrue;

VI.

It is specifically alleged as an aggravating factor in discipline, under Standard 9.22(a), prior disciplinary offenses, North Dakota Standards for Imposing Lawyer Sanctions, that Shirley A. Dvorak was:

1. suspended from the practice of law for thirty days, effective August 8, 1998, by Order of the North Dakota Supreme Court, in Supreme Court No. 970341, File No. 2782-E-9611, as reciprocal discipline for suspension from practice for 30 days imposed by the Minnesota Supreme Court for receiving a greater payment from bankruptcy clients than allowed by the Court, as reported at 554 NW2d 399 (Minn. 1996);

2. that Shirley A. Dvorak received an admonition on March 1, 1997, in File No. 2767-E-9610, for violation of Rule 3.4, fairness to opposing party and counsel and Rule 1.2(A)(3), NDRLD, conduct involving dishonesty, fraud, deceit or misrepresentation and Rule 1.2(8), NDRLD, conduct prejudicial to the administration of justice, for presenting documents to opposing counsel and the Court as affidavits that had been signed before her as notary public, although she knew that these individuals had not executed the documents in her presence as stated;

3. that Shirley A. Dvorak received a reprimand from the Disciplinary Board on August 18, 1995, in File No. 2503-E-9504, for misdemeanor conviction of filing a fraudulent federal income tax return;

4. that Shirley A. Dvorak received a private reprimand on February 18, 1989, in File No. 1555-E-88, for violation of Rule 3.1 in that she filed an attorney's lien without a basis that is not frivolous.

Said discipline has been ineffective in deterring conduct of Shirley A. Dvorak which is in violation of the North Dakota Rules of Professional Conduct.

WHEREFORE, it is the request that Attorney Shirley A. Dvorak be disciplined.

Dated this 15 day of July, 1998.

/s/ Paul W. Jacobson
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Dated this 15th day of July, 1998.

/s/ Vivian E. Berg
Vivian E. Berg (ID 03548)
Disciplinary Counsel

APPENDIX D

Rules 3.4(a) And 4.4, North Dakota Rules Of Professional Conduct

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.